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May 24, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: August 31, 2004

Case No.: TIA-0182

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits based on the employment of his late wife (the Worker). The Worker was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Worker did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's

employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.¹

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* §3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* §3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Worker was employed as a clerk at the Savannah River Site (the site). The Worker is deceased.

The Applicant filed a Subpart D application with DOE, requesting physician panel review. The Applicant stated that the Worker was employed at the plant for approximately 32 years -- from 1951 to 1983. The Applicant requested physician panel review of one illness -- ovarian cancer. At the same time, the Applicant filed a Subpart B application with DOL, which referred the application to the National Institute of Occupational Safety and

¹ www.eh.doe.gov/advocacy

Health (NIOSH) for a dose reconstruction. The Applicant elected to have OWA refer the Subpart D application to the Physician Panel without awaiting the results of the NIOSH dose reconstruction.

The Physician Panel rendered a negative determination on the Worker's ovarian cancer. The Panel stated that the Worker's ovarian cancer was unrelated to radiation exposure at the site. Specifically, the Panel cited the absence of medical literature documenting a relationship between the Worker's level of radiation exposure and ovarian cancer. Similarly, although one Panel member cited asbestos exposure as a possible contributory factor to ovarian cancer, the Panel found that the Worker's asbestos exposure was minimal and, therefore, not a factor. Finally, the Panel cited numerous non-occupational risk factors for ovarian cancer. The OWA accepted the Physician Panel's determination. The Applicant filed the instant appeal.

In his appeal, the Applicant states that the Worker's exposures at the plant resulted in her illness and death. The Applicant submitted 109 pages of information discussing the health effects of low level radiation.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to a toxic exposure during employment at DOE. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12.

The Applicant has not identified an error by the Panel. The Applicant disagrees with the Panel's medical opinion that the Worker's level of radiation exposure was too low to be a factor in her illness. The Applicant's submission of material about the effects of low level radiation does not indicate Panel error. The Panel did not have an opportunity to consider this material, or its applicability to the Worker's situation. If the Applicant would like this material to be considered, the Applicant should raise the matter with DOL. More importantly, if the Applicant believes that the NIOSH dose reconstruction supports his claim, the Applicant should raise that matter with DOL.

As the foregoing indicates, the Applicant has not identified Panel error and, therefore, the appeal should be denied.

In compliance with Subpart E, these claims will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's review of these claims does not purport to dispose of or in any way prejudice the DOL's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy, Case No. TIA-0182, be, and hereby is, denied.
- (2) This denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: